Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

No. 94-1059

IN THE

Supreme Court of the United States

October Term, 1994

RUSSELL CALAMIA,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUSAN A. MAHER
DEPUTY GENERAL COUNSEL
FLORIDA DEPARTMENT OF
CORRECTIONS
2601 Blair Stone Road
Tallahassee, Florida 32399
(904) 488-2326

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

Respondent differs with Question 3 as framed by the Petitioner in that it presumes that Petitioner possessed a liberty interest in receiving and retaining early release credits allocated solely to alleviate prison overcrowding.

It is the Respondent's position that Question 3 should be characterized as follows:

> 3. Whether Florida's overcrowding statutes, in particular, Section 944.277, Florida Statutes, created protected liberty interests in retaining early release credits allocated solely due to prison overcrowding such that retroactive cancellation of those credits under either Section 944.277(1)(i), Florida Statutes (Supp. 1992) and Section 944.278, Florida Statutes 1993), deprived Petitioner of his liberty without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page No.

Questions Presented i

Table of Contents ii

Table of Authorities iii

Constitutional and Statutory Provisions Involved . . . 1

Statement of the Case 3

Summary of Argument 7

Reasons For Denying the Writ 8

As to Question 1 8

As to Question 2 14

As to Question 3 17

Conclusion 20

TABLE OF AUTHORITIES

CASES	*Page No.*
Arnold v. Cody, 951 F.2d 280 (10th Cir. 1991)	9
Barnes v. Oklahoma, 791 P.2d 1010 (Okla.Crim. App. 1990)	13
Collins v. Youngblood, 497 U.S. 37 (1990)	10, 11
Costello v. Wainwright, 397 F. Supp. 20 (M.D. Fla. 1975), *aff'd* 521 F.2d 1239 (5th Cir. 1976)	3, 15
Dugger v. Rodrick, 584 So. 2d 2 (Fla. 1991), *cert. denied, sub. nom. Rodrick v. Singletary*, ___U.S.___, 112 S.Ct. 886 (1991)	11
Ekstrand v. Oklahoma, 791 P.2d 92 (Okla.Crim. App. 1990)	13
Felk v. Singletary, 589 So. 2d 905 (Fla. 1991), *cert. denied*, ___U.S.___, 112 S.Ct. 1961 (1992)	11
Gorham v. Singletary, 624 So. 2d 266 (Fla. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1193 (1994)	11
Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967), *aff'd* 390 U.S. 713 (1968)	10
Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994)	4, 8, 16
Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995)	11, 12, 13, 16
Kring v. Missouri, 107 U.S. 221 (1883)	10
Lindsey v. Washington, 301 U.S. 397 (1937)	10
Nixon v. Administrator of General Services, 433 U.S. 425 (1977)	14, 15
Raske v. Martinez, 876 F.2d 1496 (11th Cir.), *cert. denied*, ___U.S.___, 110 S.Ct. 543 (1989)	9, 11
Stafford v. Singletary, ___F.2d___, *cert. denied*, 111 S.Ct. 2801 (1991)	11
Weaver v. Graham, 450 U.S. 24 (1981)	9, 10, 11

Woolworth v. Dugger, 542 So. 2d 1335 (Fla. 1989), *cert. denied*, 493 U.S. 827 (1990) 11

CONSTITUTION, STATUTES, AND RULES

UNITED STATES CONSTITUTION

Article I, Section 10 . . . . . 1, 8, 14

Amendment XIV, Section 1 1

FLORIDA STATUTES

Chapter 944 (1983)

§ 944.598 3

Chapter 944 (1987)

§ 775.087(2) 5

§ 944.276 . . . . . 5, 6

§ 944.276(1) 17

§ 944.276(1)(a) 5

Chapter 944 (Supp. 1988)

§ 944.277 . . . . . 5, 6, 11

Chapter 944 (Supp. 1990)

§ 944.277(1)(i) 4

§ 947.146 . . . . . 5, 11

Chapter 944 (Supp. 1992)

§ 944.277(1)(i) . . . . . i, 1, 8, 14, 17

Chapter 944 (1993)

§ 944.278 . . . . . i, 1, 4, 8, 14, 17

SUPREME COURT RULES

Rule 10 8

OTHER AUTHORITIES

1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992) 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 10 provides in pertinent part:

> Section 10. No state shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts....

United States Constitution, Amendment XIV, Section 1 provides in pertinent part:

> Section 1...nor shall any State deprive any person of life, liberty, or property, without due process of law....

◆ ◆ ◆

Florida Statutes Section 944.277(1)(i) (Supp. 1992), provides in pertinent part:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity, the Secretary of Corrections shall certify to the Governor that such condition exists. When the Governor acknowledges such condition in writing, the secretary may grant up to 60 days of provisional credits equally to each inmate who is earning incentive gain-time, except to an inmate who:
>
> * * *
>
> (i) Is convicted, or has been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4); or has ever been convicted of any degree of murder in another jurisdiction....

Florida Statutes Section 944.278 (1993), provides in pertinent part:

> All awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are hereby canceled for all inmates serving a sentence or combined sentences in the custody of the department, or serving a state sentence in the custody of another jurisdiction.

STATEMENT OF THE CASE

I. Historical Background of Florida's Overcrowding Statutes

Since 1983, the State of Florida, like several other states, has enacted a series early release statutes specifically and solely designed to alleviate an overcrowding crisis which has plagued the state prison system over the last decade. In the face of a federal court consent decree on overcrowding and delivery of health services in the Florida prison system, the Legislature opted to afford the Department of Corrections an emergency relief procedure to preclude the mass release of Florida inmates at the direction of the federal courts. *See Costello v. Wainwright,* 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd,* 525 F.2d 1239 (5th Cir. 1976).

The first early release statute (Florida Statutes Section 944.598), enacted in 1983 and repealed in 1993, provided for the mandatory grant of emergency gaintime to all inmates within the prison system if the threshold of 99% of lawful capacity was reached. That statute was never implemented. Later overcrowding statutes administered by the Florida Department of Corrections (Florida Statutes Sections 944.276 and 944.277), enacted in 1987 and 1988, respectively, provided for the discretionary grant of credits to all inmates who met the criteria for such awards and who were not otherwise excluded by the statutes. The threshold levels required to trigger awards under these later statutes were below the 99% level of the original emergency release statute.

As the overcrowding crisis subsided and in light of the grave concern for public safety, the Florida Legislature began to narrow the categories of prisoners eligible for overcrowding release and exclusions were added to the statutes. Prisoners convicted of murder offenses were not initially among the excluded classes under any of the overcrowding statutes. In 1989, the Florida Legislature removed

from eligibility for early release for overcrowding any prisoner convicted of a murder offense. § 944.277(1)(i), Fla. Stat. (Supp. 1990). However, this provision did not seek to remove earlier allocations of overcrowding credits. In 1992, the Florida Legislature reenacted the statutory exclusion for murder offenses, this time giving the provision retroactive effect. *See* 1992 Op. Att'y Gen. Fla. 092-96 (December 29, 1992). The following year, the Florida Legislature repealed the overcrowding statutes administered by the Florida Department of Corrections and mandated that all overcrowding credits previously allocated to prisoners who remained in custody be cancelled. § 944.278, Fla. Stat. (1993).

II. Statement of The Case

Respondent does not accept the Petitioner's statement of the case.

In five paragraphs contained on pages 2 and 3 of the Statement of The Case, Petitioner discusses his negotiated plea and the representations of defense counsel relative to early release credits and "goodtime" upon which Petitioner allegedly relied in accepting the plea. The Secretary of the Department is not privy to the plea proceedings and, therefore, cannot verify the authenticity of the allegations surrounding the negotiated plea. However, it is the Respondent's position, as a matter of state law, that the plea negotiations are wholly separate and unrelated to the department's administration of the overcrowding statutes and irrelevant to any determination of whether the statutes constitute a violation of the *ex post facto* clause or the prohibition against bills of attainder. *See Griffin v. Singletary,* 638 So. 2d 500 (Fla. 1994) (provisional credits are not a reasonably quantifiable expectation at the time an inmate is sentenced...[but] are an inherently arbitrary and unpredictable possibility that is awarded based solely on the

happenstance of prison overcrowding..., provisional credits in no sense are tied to any aspect of the original sentence and cannot possibly be a factor at sentencing or in deciding to enter a plea).

In paragraph 4 at page 3, Petitioner incorrectly claims that at the time of his conviction he was eligible for administrative gaintime, a form of overcrowding credit under Florida Statutes Section 944.276. Respondent submits that Petitioner was neither eligible for any "goodtime" gain-time under Florida Statutes Section 944.275 or any form of early release due to prison overcrowding due to the imposition of a three-year mandatory provision which did not lapse until May 8, 1990. *See* § 775.087(2), Fla. Stat. (1987); § 944.276(1)(a), Fla. Stat. (1987).

In paragraph 5 at page 3, Petitioner mischaracterizes the operation of Florida Statutes Section 944.277 as a mandatory obligation of the department to award early release credits once the prisoner population reached 97.5 percent of lawful capacity. On the contrary, section 944.277 accorded *full discretion* to the Secretary of the Florida Department of Corrections on whether *any* overcrowding credits would be allocated when the triggering threshold was met. In that same paragraph, Petitioner erroneously states that the department allocated overcrowding (provisional) credits under section 944.277 from July 1988, when the statute became effective, until June 1993, when the statute was repealed. In actuality, the department made its last award of provisional credits in January 1991, when the Florida Parole Commission became responsible for controlling prison overcrowding through control release under Florida Statutes Section 947.146.

In paragraphs 3 and 4 at page 5, Petitioner incorrectly states that, as a result of the retroactive cancellation of overcrowding credits previously allocated under section

944.277, his sentence is 420 days longer than it would have been "under the statute that was in force when he was sentenced". Respondent first submits that Petitioner's sentence is no longer than originally meted out at sentencing in January 1988 — that is, twenty years. Additionally, Respondent points out that the 420 days of overcrowding credits retroactively cancelled were allocated Petitioner pursuant to the provisional credits statute that became effective on July 1, 1988 — more than two years after Petitioner committed his crime and approximately six months after Petitioner pled and was sentenced for his crime. Clearly, section 944.277 (provisional credits) was not in effect at the time Petitioner committed his crime or was sentenced. Rather, section 944.276 (administrative gain-time) was in effect and Petitioner was deemed ineligible for early release due to prison overcrowding under that statute until he fully served the mandatory minimum term. Petitioner did not achieve the potential eligibility for early release due to prison overcrowding until satisfaction of the mandatory term in May 1990. After that time, Petitioner was allocated 420 days of provisional credits in anticipation that his release may be necessary to control prison overcrowding; however, Petitioner never achieved release due to prison overcrowding, and the overcrowding mechanism was repealed and credits were cancelled in June 1993.

Finally, the Secretary denies that Petitioner would be eligible for release from custody at this time even if his opportunity for release due to prison overcrowding had not been cancelled.

SUMMARY OF ARGUMENT

The state and federal courts within the Eleventh Circuit have consistently held that Florida's early release statutes enacted for the purpose of controlling prison overcrowding are procedural statutes, which do not affect "substantial personal rights" relating directly to the definition of crimes, defenses or punishments, and, therefore, changes in their provisions do not violate the ex post facto clauses of the United States Constitution. Although there is one federal circuit court decision out of the Tenth Circuit which conflicts with the precedent of the Eleventh Circuit, the Tenth Circuit case is premised on a faulty *ex post facto* analysis and does not provide a basis for review by this Court in light of the overwhelmingly consistent decisional law of the state and federal courts of the Eleventh Circuit.

Florida's overcrowding statutes were enacted in response to a federal mandate achieved through a consent agreement capping the prison population. The legislation was civil, not penal, in nature, solely dedicated to addressing prison overcrowding and not designed as benefit or entitlement to Florida's prisoners. When the prison overcrowding crisis began to wane, the Florida Legislature repealed the overcrowding control mechanisms and cancelled any further early releases. The retroactive cancellation of overcrowding credits by the Florida Legislature furthers an important and non-punitive legislative purpose and is completely devoid of a motivational intent to punish. As such, this legislation does not violate the constitutional proscription against bills of attained.

Finally, the legislative history of the overcrowding statutes makes it clear that this legislation was not intended as an inmate benefit or entitlement. The Secretary of the Florida Department of Corrections retained full discretion on whether to implement the statutes in order to control prison overcrowding. The mandatory language of these

statutes was solely included to assure an orderly mechanism for administering early release due to overcrowding, by providing for a provisional release date for tracking purposes and an equal distribution base for efficient overcrowding control. Florida's prisoners had no legitimate or reasonable expectation that overcrowding would continue to afford them very early release from their sentences. This case raises no substantive due process issues or questions of great public importance that would warrant this Court's review.

For these reasons, the petition for writ of certiorari must be denied.

REASONS FOR DENYING THE WRIT

Question 1. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1)(i), Florida Statutes (Supp. 1992), to offenses committed before the effective date of the statute and the effect of the passage of section 944.278, Florida Statutes (1993) violate the prohibition against *ex post facto* laws in Article I, Section 10, Clause 1 of the United States Constitution.

Review on writ of certiorari is a matter of judicial discretion rather than of right and certiorari will be granted "only when there are special and important reasons therefor." Rule 10, Rules of the Supreme Court of the United States. Thus, the burden is on the Petitioner to show some compelling and substantial reason to invoke the jurisdiction of this Court.

Petitioner suggests there is a substantial constitutional issue to be addressed in this case. Petitioner contends that the decision of the Florida Supreme Court in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994) is in conflict with this

Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981) as well as the decisions of the Eleventh Circuit in *Raske v. Martinez*, 876 F.2d 1496 (11th Cir.), *cert. denied* 493 U.S. 993 (1989), and the Tenth Circuit in *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991).

The decisions in *Weaver* and *Raske* both applied an *ex post facto* analysis to legislation which altered eligibilities for "goodtime" gaintime awarded for a prisoner. "Goodtime" gaintime is distinguishable from credits allocated to control prison overcrowding in significant ways. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon length of the term meted out. Basic gaintime is applied as a lump sum award to reduce the overall length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is a quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in *Weaver,* may operate as a "factor...[in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of "gaintime" operate in tandem with the length of sentences imposed, they affect the "quantum of punishment" which attaches at the time the crime is committed. Conversely, the eligibility and receipt by a prisoner of early release awards, whether those awards are called "gaintime", "credits", "allotments", etc., is in no way tied to the overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate

punishment meted out. The sole purpose of the early release statutes is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. Florida's overcrowding statutes are procedural in nature — their purpose directed to alleviating the administrative crisis of prison overcrowding — not to the traditional purposes of punishment. Consequently, Florida's overcrowding statutes create no "substantial personal rights" relating directly to the definition of crimes, defenses, or punishments, as defined and limited by this Court's decision in *Collins v. Youngblood*, 497 U.S. 37 (1990).[1]

---

1 It is worthwhile to note that at least two justices writing separate opinions in the *Weaver* decision found the case to be a close call the on ex post facto analysis. In particular, Justice Blackmun was compelled to concur in the judgment solely because of prior precedent in *Lindsey v. Washington*, 301 U.S. 397 (1937) and the summary disposition in *Greenfield v. Scafati*, 277 F. Supp. 644 (Mass. 1967), *aff'd*, 390 U.S. 713 (1968). However, Justice Blackmun noted that:

> Were the Court writing on a clean slate, I would vote to affirm the judgment of the Supreme Court of Florida, My thesis would be: (a) the 1978 Florida statute operates only prospectively and does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of the petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute.

Weaver, 450 U.S. at 36-37.

In rendering its decision in *Youngblood*, this Court sought to restore the proper scope of the Ex Post Facto Clause. Significant to this case is the fact that the *Youngblood* Court specifically rejected the ex post facto test earlier defined in *Kring v. Missouri*, 107 U.S. 221 (1883), as one "which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." This is precisely the test which Petitioner suggests this Court use in analyzing his ex post facto challenge. However, *Youngblood* makes clear that the language cited in *Kring* was never intended "to mean that the Constitution prohibits retrospective laws, other than those

Very recently, the Eleventh Circuit affirmed the state's characterization of its prison overcrowding statutes as non-substantive, procedural mechanisms. *See Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). In *Hock*, the petitioner claimed his rights under the *ex post facto* clause were being violated because he was no longer being awarded provisional credits (due to prison overcrowding) under section 944.277[2] and he was determined ineligible for control release, the state's latest mechanism for controlling prison

encompassed by the Calder categories, which 'alter the situation of a party to his disadvantage.'" *Youngblood*, 491 U.S. at 49-50.

Since *Youngblood* was rendered, this Court has not considered a case involving "good-time" credits so its impact on the *Weaver* decision remains unknown; however, on the five previous occasions on which the Court has considered certiorari petitions raising ex post facto challenges to Florida's early release statutes and has declined to accept any of those petitions for review, thus leaving the decisions of the courts of this state and circuit intact. *See Woolworth v. Dugger*, 542 So. 2d 1335 (Fla. 1989), *cert. denied*, 493 U.S. 827 (1990); *Stafford v. Singletary*, ___F.2d___, *cert. denied*, 111 S.Ct. 2801 (1991); *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied, sub. nom. Rodrick v. Singletary*, ___U.S.___, 112 S.Ct. 886, 116 L.Ed.2d 790 (1991); *Felk v. Singletary*, 589 So. 2d 905 (Fla. 1991), *cert. denied*, ___U.S.___, 112 S.Ct. 1961, 118 L.Ed.2d 563 (1992); *Gorham v. Singletary*, 624 So. 2d 266 (Fla. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1193 (1994).

In any event, *Youngblood* demands that a line be drawn on the expansion of the Ex Post Facto Clause. Assuming that the decisions in *Weaver v. Graham*, 450 U.S. 24 (1981) and *Raske v. Martinez*, 876 F.2d 1496 (11th Cir. 1989), can withstand the *Youngblood* scrutiny, the line must and should be drawn in extending ex post facto prohibitions to early release mechanisms which provide a temporary remedy for alleviating the administrative crisis of prison overcrowding and which are in no way related to the ultimate punishment meted out but are contingent on many outside variables which contribute to prison overcrowding.

2 Hock's ineligibility for provisional credits resulted from the enactment of Florida Statutes Section 947.146, an early release mechanism that supplanted the provisional credits statutes. Although Hock received provisional credits while Florida Statutes Section 944.277 was in effect, he was statutorily ineligible to be released early under section 947.146 (control release).

overcrowding. While the Eleventh Circuit acknowledged that Florida's supreme court had explicitly recognized that Florida's early release statutes are "procedural in nature, [and] are not directed toward the traditional purposes of punishment", *Hock*, 41 F.3d at 1472, citing *Dugger v. Rodrick*, 584 So. 2d 2, 4 (Fla. 1991), *cert. denied sub nom. Rodrick v. Singletary*, ___U.S.___, 112 S.Ct. 886, 116 L.Ed.2d 790 (1992), the court went on to conclude that, independent of the Florida authorities, "any disadvantage suffered by the petitioner does not affect punishment and therefore does not violate the Ex Post Facto Clause." *Hock*, 41 F.3d at 1472. The Eleventh Circuit further distinguished the cases dealing with early release credits from those addressing basic and incentive gaintime:

> The control release statute is quite different. it reduces an inmate's imprisonment automatically for the convenience of the Department of Corrections. The statute is procedural, not substantive like "good-time" gain time, and therefore is not ex post facto. *Rodrick*, 584 So. 2d at 4.
>
> Additionally, the retroactive application of control release does not actually disadvantage the petitioner by reducing his opportunity to shorten his time in prison. Because control release is based on an arbitrary and unpredictable determinant, the prison population level, an inmate has no reasonable expectation at the time he is sentenced that the prison population will reach the specified triggering level and that his incarceration will therefore be reduced.

Hock, 41 F.3d at 1472-1473.

While the *Hock* decision is indeed in conflict with the *Arnold* decision of the Tenth Circuit, *Arnold* is erroneously

grounded in the effect-based analysis of *Weaver, Miller,* and *Lindsey;* the focus is on the potential lengthening of incarceration. The *Arnold* court had for review an appeal from a federal habeas in which the Oklahoma prisoner challenged an amendment to Oklahoma's prison overcrowding statutes which reduced his eligibility for emergency release due to overcrowding. In *Arnold,* the Tenth Circuit relied on an earlier decision of the Oklahoma Court of Criminal Appeals, *Ekstrand v. Oklahoma,* 791 P.2d 92 (Okla.Crim.App.1990) (citing *Weaver*), in which the Oklahoma court addressed whether an amended Oklahoma statute relating to "earned" credits was an *ex post facto* law when its application to prisoners resulted in the computing of fewer earned credits than under the statute before the amendment, thereby lengthening the prisoners' sentences. *Id.* at 93. In *Ekstrand,* "[a]fter comparing the potential for earning credits before and after amendment, the [Oklahoma] court concluded that the amendment was disadvantageous". *Id.* at 94. Based on that factor, and that factor alone, the Oklahoma court declared the amendment in violation of the *ex post facto* clause.

In adopting *Ekstrand,* the Tenth Circuit rejected another decision of the Oklahoma Court of Criminal Appeals, *Barnes v. Oklahoma,* 791 P.2d 1010 (Okla.Crim.App.1990), in which Oklahoma, like Florida, drew a distinction between credits earned for good behavior, which were the subject of the *Ekstrand* decision and emergency credits meted out to alleviate prison overcrowding. Like Florida's courts and the federal district courts in this circuit, the Oklahoma court concluded that prison overcrowding was unrelated to a prisoner's crime and could not be viewed as a consequence attached to the crime at the time it was committed. As a result, eligibility for emergency release due to overcrowding never ventured into the realm subject to ex post fact analysis. The Tenth Circuit rejected the state court's determination of the nature of emergency overcrowding credits, finding no difference between "earned"

credits and "emergency" credits. Such a matter is a determination of state law that should not have been disturbed. When closely analyzed, the *Arnold* court's sole test for whether an *ex post facto* violation occurred was whether Arnold himself was disadvantaged. This factor alone is an incorrect test in assessing an ex post facto challenge.

This singular, conflicting decision is founded on an incorrect test and does not provide a compelling basis for this Court to review the consistent decisions of the state and federal courts within this circuit.

Question 2. Whether the retroactive application of the exclusions from eligibility for provisional release credits in Section 944.277(1)(i), Florida Statutes (Supp. 1992) and Section 944.278, Florida Statutes (1993), is an unconstitutional violation of the prohibition against bill of attainder contained in Article I, Section 10, of the United States Constitution.

Petitioner asserts that the Court should review this case because Florida's enactment of retroactive legislation cancelling overcrowding credits and eliminating the possibility of very early release due to prison is an unconstitutional bill of attainder. As Petitioner notes, a legislative act may be a bill of attainder if it "legislatively determines guilt and inflicts punishment upon an indentifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). In assessing whether a challenged act constitutes punitive legislation, this Court has generally viewed three areas: (1) whether any feature of the act falls within the historical category of punishment, (2) whether the act functionally furthers no non-punitive legislative purpose, and (3) whether

the legislative history of the act shows a motivational intent to punish. *Id.* at 473-478.

The challenged legislation survives these tests.

Petitioner asserts that the two legislative provisions fall within the historical category of punishment simply because he was deprived of the opportunity for *very* early release and that he will now be required to serve the term of imprisonment as imposed. Petitioner incorrectly states that his prison term has been *increased* through cancellation of overcrowding credits. Petitioner's 20-year term remains intact, as does his tentative release date calculated due to application of "goodtime" gaintime for positive behavior. The fact that Petitioner will not achieve a very, very early release from his term of incarceration due to prison overcrowding, a factor totally unrelated to Petitioner's crime and the punishment meted out, simply cannot be viewed as a historical category of punishment.

Moreover, the retroactive cancellation of overcrowding credits by the Florida Legislature furthers an important and non-punitive legislative purpose and is completely devoid of a motivational intent to punish. Florida's overcrowding statutes were enacted in response to a federal mandate achieved through a consent agreement capping the prison population in the case of *Costello v. Wainwright*, 397 F.Supp. 20 (M.D. Fla. 1975), *aff'd*, 525 F.2d 1239 (5th Cir. 1976). Without these statutes, the federal court system would have been saddled with effecting the release of Florida's prisoners. Florida did not abdicate its responsibility. The legislature sought ways to confront the burgeoning prison population including the increased building of prisons, the development of front-end diversionary programs, and amended sentencing guidelines. As an interim and temporary safety valve, Florida put in place early release mechanisms to offset the front-end flow of prisoners. When the

overcrowding crisis began to wane, the Florida Legislature appropriately terminated the overcrowding mechanisms and cancelled all further early releases in deference to public safety.

The legislation is civil, not penal, designed solely to contain prison overcrowding. Petitioner had no vested right or legitimate expectation that he would attain early release due to prison overcrowding. *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994); *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995). No doubt Petitioner feels personally disadvantaged because he failed to achieve the windfall of very early release from his prison term due to prison overcrowding, but potential unfairness of retroactive civil legislation to an individual or group of individuals does not in and of itself violate the constitutional proscription against bills of attainder.

Question 2 provides no basis for this Court to grant review.

Question 3 (Restated). Whether Florida's overcrowding statutes, in particular, Section 944.277, Florida Statutes, created protected liberty interests in retaining early release credits allocated solely due to prison overcrowding such that retroactive cancellation of those credits under either Section 944.277(1)(i), Florida Statutes (Supp. 1992) and Section 944.278, Florida Statutes (1993), deprived Petitioner of his liberty without fair notice and procedure in violation of the Fourteenth Amendment to the United States Constitution.

Petitioner claims that Florida has created a protected liberty interest in retaining overcrowding credits and that this Court must grant review to ensure the fundamental right of constitutional due process.

Florida's overcrowding statutes create no protected liberty interests and any mandatory language contained in those statutes was placed there solely to assure an orderly mechanism for controlling overcrowding. The only mandatory language in the administrative gaintime statute, the forerunner to the provisional credits statute at issue here, appears in the sentence that requires the Department of Corrections to certify that the system has reached 98 percent of lawful capacity as defined by s. 944.598. See §944.276(1), Fla. Stat. (1987).[3]

---

3 Section 944.276(1) provided, in part:

> Whenever the inmate population of the correctional system reaches 98 percent of lawful capacity as defined in s. 944.598, the secretary of the Department of Corrections *shall* certify to the Governor that such condition exists. When the Governor acknowledges such certification in writing, the secretary *may* grant up to a maximum of 60 days administrative gain-time equally to all inmates who are earning incentive gain-time.... (emphasis added)

However, this mandatory certification in no way required the Department to *award* administrative gaintime — rather, once the Governor acknowledged the certification in writing, then it was up to the secretary to decide whether to grant the early release credits or not.[4]

Similar language requiring a certification to the Governor appeared in the provisional credits statute; however, like the administrative gaintime statute, the decision on whether to grant any early release credits was up to the secretary of the department once the certification was acknowledged by the Governor. Additional mandatory language appeared in subsections (2), (3), and (4) of section 944.277; however, the language contained in these sections essentially assured an orderly mechanism for administering early release due to overcrowding, by providing for a provisional release date for tracking purposes and an equal distribution base for efficient overcrowding control. Without an orderly mechanism, it would not have been possible for the department to determine quickly and efficiently when the floor of 97% of lawful capacity was reached. Thus, the mandatory language was in place for the purpose of providing an orderly mechanism — not for the purpose of assuring or creating an inmate benefit or entitlement.

Petitioner improperly likens overcrowding credits to basic and incentive gaintime earned and awarded for good behavior. While the fact that a prisoner was earning incentive gaintime was a consideration in whether overcrowding

---

4 The specific language of the statute is "the secretary *may* grant up to a maximum of 60 days...". Clearly there was no mandatory burden upon the secretary to award the gaintime after certification; however, once the decision was made to award the early release credits, it was incumbent upon the secretary to award it equally to all eligible inmates. To do otherwise would have made the system to cumbersome to effectively apply as daily calculations of prisoner population and capacity were necessary to monitor overcrowding.

credits were meted out to him on the particular date of allocation, this criteria was merely an indicia of whether the prisoner remained an acceptable risk for very early release into the community. A prisoner in no way earned overcrowding credits. The fact that some prisoners who were otherwise eligible for overcrowding credits may have performed better or exhibited good behavior as a result is nothing more than an incidental effect of the statutes. Neither Petitioner nor any other prisoner can create for himself a protected liberty interest simply because he is good.

There is no protected liberty interest at issue here nor a question of great public importance that would warrant this Court's review of the decision below.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

SUSAN A. MAHER
DEPUTY GENERAL COUNSEL
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399
(904) 488-2326

Counsel for Respondent